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FILED
MAR 14 2007

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No. 79661-1

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SUPREME COURT
STATE OF WASHINGTON
2007 MAR -5 P 4:35

SUPREME COURT
OF THE STATE OF WASHINGTON

TESORO REFINING AND MARKETING COMPANY,

Plaintiff-Petitioner

v.

STATE OF WASHINGTON,
DEPARTMENT OF REVENUE,

Defendant-Respondent

ON PETITION FOR REVIEW FROM
COURT OF APPEALS, DIVISION II

AMICUS CURIAE MEMORANDUM OF
WESTERN STATES PETROLEUM ASSOCIATION
IN SUPPORT OF PETITION FOR REVIEW

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I. REASONS TO ACCEPT REVIEW

The Western States Petroleum Association (“WSPA”) respectfully requests that this Court grant the petition for review filed by Tesoro Refining and Marketing Company (“Tesoro”). The published decision of the Court of Appeals¹ (1) permits state agencies to retroactively impugn their own lawfully promulgated and adopted rules and (2) allows state agencies to claim that a lawfully promulgated and adopted rule is invalid without complying with the requirements of the Washington Administrative Procedures Act, chapter 34.05 RCW (“APA”), which requires the repeal of the rule as the appropriate action. For the reasons set forth below, WSPA submits that these effects warrant review -- and correction -- by this Court.

A. Statement of the Case.

WSPA adopts the Statement of the Case set forth in Tesoro’s Petition for Review.

B. The Issue.

The overarching issue before this Court is why taxpayers in the state of Washington should not be entitled to rely on a lawfully promulgated and adopted state agency interpretive regulation in the

¹ The decision is reported at *Tesoro Refining & Mktg. Co. v. State*, 135 Wn. App. 411, 144 P.3d 368 (2006).

conduct of their businesses. This is an urgent issue not only for refiners and manufacturers attempting to comply with the Department of Revenue's (DOR) WAC 458-20-252 ("Rule 252") dealing with Hazardous Substance Tax (HST), but for all businesses and individuals who rely on *any* state agency rules in the conduct of their businesses. This critical issue determines whether citizens can reasonably rely on duly adopted regulations or must second guess whether the state agency was incompetent when it adopted the regulation. This issue warrants review by this Court under RAP 13.4(b)(4), because it "involves an issue of substantial public interest that should be determined by" this Court.

C. Grounds for Review.

1. Subsection (7)(b) of Rule 252 Reasonably Interprets the HST, and the DOR's Grounds for Repudiating That Reading Are Patently Untenable.

Rule 252 is comprehensive. It prints in ten single space pages of text.² WSPA members worked actively with DOR in the initial adoption and subsequent amendment of Rule 252.

Subsection (7)(b) of Rule 252 sets forth a clear and unambiguous interpretation of the HST's applicability to internally created and consumed substances.³ Subsection (7)(b) declares that the tax does not

² See DOR's website at <http://apps.leg.wa.gov/WAC/default.aspx?cite=458-20-252>).

³ DOR has interpretive rule-making authority. *Association of Washington Bus. v.*

(continued . . .)

apply to such substances. The conclusion that a hazardous substance tax (also known as the “pollution tax”) should not apply to substances created and consumed in a closed manufacturing environment is entirely fair, practical and reasonable, for the obvious consideration that such substances by their very nature do not pollute. Moreover, the law, through subsection (7)(b), encourages manufacturers to develop processes that are designed to prevent harmful products or substances from entering the environment, whether it be the land, the air or the water. Manufacturers should be rewarded for implementing these processes, and to interpret the HST otherwise discourages manufacturers from designing processes that do not pollute.

Contrary to DOR’s suggestion, this is not a case where the agency went beyond its authority in adopting subsection (7)(b). Instead, it is a case where DOR construed or interpreted an ambiguous statute that did not directly address internally produced and consumed substances, so as to avoid an absurd consequence or result. *See, e.g., Ski Acres v. Kittitas County*, 118 Wn.2d 852, 857, 827 P.2d 1000 (1992) (“statutes should be

(. . . continued)

Department of Revenue, 155 Wn.2d 430, 439, 437 P.3d 46 (2005) (“As the enforcer of the revenue statutes, DOR of necessity makes interpretive decisions about those statutes”); *see Edelman v. State ex rel. Public Disclosure Comm’n*, 152 Wn.2d 584, 590, 99 P.3d 386 (2004) (“An agency charged with the administration and enforcement of a statute may interpret ambiguities within the statutory language through the rule-making process”).

construed to effect their purpose, and unlikely, absurd or strained consequences should be avoided”) (citing *State v. Stannard*, 109 Wn.2d 29, 36, 742 P.2d 1244 (1987)). Subsection (7)(b) is plain, unambiguous, and a reasonable interpretation of legislative intent. An agency should not be allowed to repudiate such a reasonable interpretation of an ambiguous statute, simply because doing so may serve the pursuit of victory in the immediate case at hand. Agencies that engage in this tactic completely undermines the ability of any business to rely upon agency interpretations, as the business attempts to conform its conduct to the requirements of the law.

2. The Court of Appeals’ Reliance on a Rule’s Heading Is Inappropriate.

The Court of Appeals stated that the title of subsection (7)(b) -- “recurrent tax liability” -- “implies that the taxpayer must have at least two possible instances of taxable possession before the rule applies.” *Tesoro*, 135 Wn. App. at 426 (emphasis added); see DOR’s Answer at 15. In other words, the court interpreted the HST statute and rule based on the court’s belief about what the drafters of Rule 252 “impliedly” intended. WSPA and its members know firsthand the difficulty for accountants and other persons employed in a manufacturing operation to decipher the reporting requirements of a tax without having also to perform an

additional analysis of what the drafters of a statute or rule impliedly intended, notwithstanding the presence of otherwise plain and unambiguous language of a regulation like Rule 252. Imagine the difficulty that a small business with one or two employees would have in complying with laws if it could not depend on the published rules but had to investigate further if the agency really meant what it said. Why should a taxpayer, after reading subsection (7)(b)'s plain and unambiguous requirements, have to go one step further -- as the Court of Appeals now mandates -- to determine what Rule 252 drafters impliedly intended the words of subsection (7)(b) to mean, based upon the language of the rule's heading rather than the terms of the rule itself?

The Court of Appeals' "implication by headings" approach warrants review and correction by this Court for at least two reasons. First, any requirement to inquire beyond the plain language of a regulation interpreting the application of a tax statute conflicts with the principle that any doubt as to the meaning of a tax-imposing statute is to be interpreted "most strongly against the taxing power and in favor of the citizen." *Buffelen Lumber & Mfg. Co. v. State*, 32 Wn.2d 40, 43, 200 P.2d 509 (1948) (citing *Weyerhaeuser Timber Co. v. Henneford*, 185 Wash. 46, 53 P.2d 308 (1936)). Second, this Court has held that headings "are of little use as a guide to the intent of the legislature" in statutory interpretation

because they “are added by the code reviser subsequent to enactment. . . .”

Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 149 Wn.2d 660, 684 n.10, 72 P.3d 151 (2003) (citing *State v. Arndt*, 87 Wn.2d 374, 379, 553 P.2d 1328 (1976)). Headings employed for administrative rules

and regulations should be given no greater value, as courts “apply . . .

rules of statutory construction to administrative rules and regulations. . . .”

Pitts v. Dep’t of Social & Health Servs., 129 Wn. App. 513, 528, 119 P.3d 896 (2005) (citing *City of Kent v. Beigh*, 145 Wn.2d 33, 45, 32 P.3d 258 (2001); *State v. Burke*, 92 Wn.2d 474, 478, 598 P.2d 395 (1979)).

3. DOR’s Authorities Are Not on Point.

DOR argues that two cases of this Court have rejected taxpayer’s argument that they are entitled to rely on a rule that allegedly granted more favorable tax treatment than provided by law. *See* DOR’s Answer at 15-17 (citing *Coast Pacific Trading, Inc. v. Department of Revenue*, 105 Wn.2d 912, 719 P.2d 541 (1986), and *Budget Rent-A-Car of Washington-Oregon, Inc. v. Department of Revenue*, 81 Wn.2d 171, 500 P.2d 764 (1972)). A careful reading of these cases discloses that they are not on point and distinguishable from this case.

In *Coast Pacific*, the taxpayers argued that a DOR’s WAC 458-20-193C exempted certain exports from business and occupation (“B&O”) tax. DOR had not amended this rule since the United States

Supreme Court had subsequently “initiated a different approach” to the states’ taxation of exports. *Coast Pacific*, 105 Wn.2d at 916 (citing *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 46 L. Ed. 2d 495, 96 S. Ct. 535 (1976), and *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978)). This Court found the evolution of the states’ expanded right to tax exports as determined by the U.S. Supreme Court to be persuasive, finding that “[a]rguably the *Michelin* and *Stevedoring* decisions have reduced the scope of the constitutional prohibition of export and import taxes.” *Coast Pacific* at 918. Thus, the Court in *Coast Pacific* disallowed the export exemption from B&O tax “because it was based on a regulation that attempted to expand tax immunity beyond what the underlying statute and constitution required.” *Association of Washington Bus. v. Department of Revenue*, 155 Wn.2d at 441 (citing *Coast Pacific*, 105 Wn.2d at 917). More importantly, and as clarified in *Association of Washington Bus.*, the concern in *Coast Pacific* was “an agency rule that amended a statute, not one that interpreted it.”⁴ *Association of Washington Bus.* at 441. Here, the dispute over the proper interpretation of subsection (7)(b) falls

⁴ *Bostain v. Food Express, Inc.*, ___ Wn. 2d ___, ___ P. 3d ___ (2007) (Docket No. 77201-1), decided by this Court on March 1, 2007, remedies an agency’s invalid interpretation of an *unambiguous* statute. That case has no application here, because DOR exercised its lawful authority to interpret an *ambiguous* statute so both the agency and the taxpayer could comply with the law.

squarely under the latter category, i.e., this is the case of an agency rule interpreting a statute.

In addition, the *Coast Pacific* case dealt with a deduction or exemption from taxation, which is to be interpreted strictly and narrowly against the taxpayer and in favor of the government. *Simpson Inv. Co. v. Department of Revenue*, 141 Wn.2d 139, 149-50, 3 P.3d 741 (2000).

Here, the question before the Court is whether DOR's interpretation of the HST made through the promulgation of subsection (7)(b), and without any contrary authority or change to the underlying statutes between the original adoption in the late 1980s and today, is reasonable. Since this case involves a tax-imposing statute, it must be construed against DOR and in favor of the taxpayer. See *Weyerhaeuser v. Department of Revenue*, 106 Wn.2d 557, 566, 723 P.2d 1141 (1986) (citing *Duwamish Warehouse Co. v. Hoppe*, 102 Wn.2d 249, 254, 684 P.2d 703 (1984); *Mac Amusement Co. v. Department of Revenue*, 95 Wn.2d 963, 966, 633 P.2d 68 (1981)). ("Any doubts as to the meaning of a statute under which a tax is sought to be imposed will be 'construed against the taxing power'" and in favor the taxpayer). *Coast Pacific* is clearly distinguishable from this case and, in fact, supports Tesoro's legal position.

Budget Rent-A-Car similarly offers no good authority for DOR. In that case, this Court again interpreted an exemption statute that must be

“narrowly construed” against the taxpayer. *Budget*, 81 Wn.2d at 174. The Court found that DOR’s rule in question (WAC 458-20-106) was simply “not open to this taxpayer.” *Budget, supra*. This is a far cry from the question present here, concerning whether subsection (7)(b) applies the HST to refinery gas. In short, *Budget* is no more on point than *Coast Pacific*.

4. The Administrative Procedures Act Provides the Mechanism for DOR to Repeal a Rule It Later Finds to Have Been Adopted in Error.

The APA sets forth the rule-making procedures for agencies (like DOR) to propose, adopt, amend and, most significantly for purposes of this case, repeal rules. *See* Chapter 34.05 RCW, Part III; RCW 34.05.310-34.05.395. In particular, if DOR finds that its rule violates a statute, its recourse is to repeal the rule or section of the rule believed to not be in conformance with the statute. *See* RCW 34.05.350. The repeal can even be done on an “emergency” basis (RCW 34.05.350(a)), which means the repeal takes effect immediately upon filing with the Code Revisor (RCW 34.05.350(2)). The sole remedy for agencies to “challenge” or retroactively impeach their own rules is the repeal provisions of the APA, and this Court should accept review of this case to address this issue.

Furthermore, the Court of Appeals’ decision *and* DOR’s *willingness to impeach its own rule* violates the spirit and intent of the

Taxpayers' Rights and Responsibility Act, to wit:

The taxpayers of the state of Washington
have:

... (5) The right to receive, upon request,
clear and current tax instructions, rules,
procedures, forms, and other tax
information.

RCW 82.32A.020. Although the statute provides no expressed remedies,⁵
this Court should consider whether the Court of Appeals' decision,
allowing DOR to impeach its own rule reduces this right to an inane
platitude and a meaningless legislative action.

II. CONCLUSION

WSPA urges this Court to grant review to correct the Court of
Appeals' erroneous decision.


RESPECTFULLY SUBMITTED this 5th day of March, 2007.

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⁵ This right implies that there is a corresponding right to rely on the rules promulgated by
DOR.